STATE OF MICHIGAN

COURT OF APPEALS

In re GRACE/BROWN, Minors.

UNPUBLISHED
March 17, 2015

No. 321872
Genesee Circuit Court
Family Division
LC No. 11-127849-NA

In re GRACE, Minors.

No. 321875
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Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

In Docket No. 321875, respondent K. Grace appeals as of right from the trial court's order terminating his parental rights over KDG, JFG, and JTG pursuant to MCL 712A.19b(3)(c)(*i*) (conditions that led to adjudication continue to exist) and (g) (failure to provide proper care and custody). In Docket No. 321872, respondent A. Webb appeals as of right from the trial court's order terminating her parental rights over KDG, JFG, JTG, and DNB pursuant to MCL 712A.19b(3)(c)(*i*) and (g).[1] We affirm the order with respect to Webb and vacate the order with respect to Grace and remand for further proceedings.

I. DOCKET NO. 321875

Grace argues that under *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), the order terminating his parental rights must be vacated because he was never adjudicated as unfit. We agree.

[1] The parental rights of respondent B. Brown, the father of DNB, were also terminated below, but he did not appeal.

"[A] respondent may raise a *Sanders* challenge to a trial court's adjudication in a child protective proceeding on direct appeal from the trial court's order terminating that respondent's parental rights." *In re Kanjia (On Reconsideration)*, ___ Mich App ___, ___; ___ NW2d ___ (2014); slip op at 7. "That is, such an appeal does not constitute an impermissible collateral attack on the trial court's adjudication." *Id.* at ___; slip op at 7. Whether a child protective proceeding adequately protects a parent's procedural due process rights is a question of constitutional law that we review de novo. *Sanders*, 495 Mich at 403-404.

The Fourteenth Amendment's due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997). One of these fundamental rights is "the right of parents to make decisions concerning the care, custody, and control of their children." *Sanders*, 495 Mich at 409. In *Sanders*, our Supreme Court held that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Id.* at 422. A parent must be adjudicated as unfit before the court may enter dispositional orders affecting parental rights. *Id.*

If allegations of child abuse or neglect within a petition to initiate child protective proceedings are proved by a parent's plea or by a preponderance of the evidence at trial, a parent is adjudicated unfit. *Sanders*, 495 Mich at 405. "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because '[t]he procedures used in the adjudicative hearings protect the parents from risk of erroneous deprivation' of their parental rights." *Id.* at 405-406, quoting *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993) (alteration in original). "[T]he state must adjudicate a parent's fitness *before* interfering with his or her parental rights." *Id.* at 420.

After a thorough review of the record, we agree with Grace's assertion that he was never adjudicated as unfit.[2] Webb concedes that she was adjudicated at a hearing on August 17, 2011, after entering a plea on at least one of the allegations in the petition.[3] We are confident that Grace was not adjudicated at this hearing, primarily because the record shows he was not served with the original petition until November or December 2011. It appears that Grace did not know of, let alone participate in, the August 2011 adjudication hearing. Because Grace was not properly adjudicated, the allegations against him in the petition were not proven by a plea or by a preponderance of the evidence at the adjudication trial. Consequently, the trial court had no authority to enter dispositional orders against Grace, and erred in requiring him to participate in a case service plan and in ultimately terminating his parental rights. To remedy this error, we vacate the order terminating Grace's parental rights and remand for further proceedings.

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[2] Neither petitioner, the Department of Human Services (DHS), nor the guardian ad litem has filed an appellate brief disputing Grace's claim that he was not adjudicated as unfit.

[3] Despite our efforts to locate the transcript from this hearing, we have been told that it does not exist. Consequently, our only information about what occurred comes from the orders that followed the hearing. The order dated August 17, 2011 states that Webb "admitted to leaving the children home alone." It does not refer to any other admission.

II. DOCKET NO. 321872

Webb argues that the order terminating her parental rights should be vacated because the order terminating Grace's parental rights was invalid and she and Grace reside in the same household. However, Webb cites no legal authority, and we have not found any, to support her argument. "When a party merely announces a position and provides no authority to support it, we consider the issue waived." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). Because Webb fails to provide any legal authority to support her argument, this issue is waived.

A. STATUTORY GROUNDS

Webb next contends that the trial court clearly erred in finding clear and convincing evidence that supported termination of her parental rights under any statutory ground. We disagree.

"We review for clear error a trial court's finding of whether a statutory ground for termination has been proven by clear and convincing evidence." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013). A decision is clearly erroneous "[i]f although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (citation and quotation marks omitted; alteration in original).

A trial court must find clear and convincing evidence supports at least one of the statutory termination grounds in MCL 712A.19b(3) in order to terminate parental rights. *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011). "Only one statutory ground need be established by clear and convincing evidence to terminate a respondent's parental rights, even if the court erroneously found sufficient evidence under other statutory grounds." *Id*. In this case, Webb's parental rights were terminated pursuant to MCL 712A.19b(3)(c)(*i*) and (g).

Termination under MCL 712A.19b(3)(g) is appropriate if "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." A parent's failure to comply with and benefit from a service plan is evidence supporting termination under MCL 712A.19b(3)(g). *In re White*, 303 Mich App 701, 710; 846 NW2d 61 (2014). "By the same token, the parent's *compliance* with the parent-agency agreement is evidence of her ability to provide proper care and custody." *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

In this case, Webb's parent agency agreement required her to attend domestic violence classes, anger management classes, drug screens, substance abuse treatment, parenting classes, and parenting visits. Webb was also required to obtain and maintain employment and housing. Although evidence in the record indicates Webb benefitted from her domestic violence and anger management classes, and obtained housing with minor issues that could be remedied in a reasonable amount of time, Webb was not employed at the time of the termination hearing and had not been employed for nearly one year. Webb provided no evidence that she was looking or applying for jobs. Although Webb completed parenting classes, testimony at the termination hearing revealed she did not benefit from them. Webb was frequently late to parenting visits and

missed some without calling. Family therapist Patricia Green testified that she was unsure if Webb would ever be able to develop the parenting skills needed to manage her children. Foster care workers Cami Saladin and Samantha Brown testified that Webb could not manage all of her children at once, and both workers testified that parenting visits were chaotic and lacked structure. Given the concerns about Webb's parenting abilities, the fact that the children were in care for almost three years, and Webb's lack of employment and income, the trial court did not clearly err in concluding termination was proper under MCL 712A.19b(3)(g).

Because the evidence sufficiently supported termination under one statutory ground, we need not address Webb's claim that the trial court also clearly erred in relying on MCL 712A.19b(3)(c)(*i*) to terminate her parental rights.

B. BEST INTERESTS

Webb also argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. We disagree.

We review for clear error a trial court's determination that termination of parental rights is in a child's best interests. *Olive/Metts*, 297 Mich App at 40. MCL 712A.19b(5) states that "[i]f the court finds that there are grounds for termination of parental rights and that termination . . . is in the child's best interests, the court shall order termination of parental rights." To decide if termination is in a child's best interests, courts may consider "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *Olive/Metts*, 297 Mich App at 41-42 (internal citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *White*, 303 Mich App at 714.

In this case, Webb's children were removed from her care in May 2011 and were in protective custody for nearly three years before the termination hearing. The trial court noted that the children were in need of stability and security. Brown testified that all of the involved foster parents were interested in adopting the children, and the children were doing well in foster care and had bonded with their foster parents. Considering the length of time the children were in care, the possibility of adoption, Webb's lack of compliance with her case service plan, and the children's well-being while in foster care, the trial court did not clearly err in finding termination was in the children's best interests.

Webb argues that the court erred in failing to make best interests findings with respect to each individual child. In *Olive/Metts*, 297 Mich App at 42, this Court held that "the trial court has a duty to decide the best interests of each child individually." In *White*, 303 Mich App at 715-716, this Court clarified the *Olive/Metts* holding, stating the following:

> We conclude that this Court's decision in *In re Olive/Metts* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests. It does not stand for the proposition that the trial

> court errs if it fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests.

In *White*, this Court noted that some of the children in *Olive/Metts* were placed with relatives while others were not, and the trial court clearly erred "by failing to distinguish between two *groups* of children—the younger children, who were placed with relatives, and the older children, who were not." *Id.* at 715.

In this case, all four children were similarly situated. They were all removed in 2011, almost three years before the termination hearing, and at the time of the termination hearing they were all placed in foster care. Because the children in this case were similarly situated and had similar interests with respect to their need for stability and permanency, the trial court did not need to make separate factual findings with respect to each child's best interests.

C. EVIDENTIARY ISSUES

Finally, Webb argues that the trial court abused its discretion with respect to several evidentiary issues, which cumulatively prejudiced her. We disagree. We review a trial court's decisions regarding evidentiary issues in a child protective proceeding for an abuse of discretion. *In re Jones*, 286 Mich App 126, 130; 777 NW2d 728 (2009). "An abuse of discretion occurs when the trial chooses an outcome that falls outside the range of principled outcomes." *Id*. (citations and quotation marks omitted).

The Michigan Rules of Evidence, except those regarding privileges, do not apply to child protective proceedings, except where a court rule specifically states otherwise. MCR 3.901(A)(3). MCR 3.977(H) provides that when a termination hearing is not part of the initial dispositional hearing or based on a supplemental petition alleging circumstances different than those leading to adjudication, the applicable evidentiary standard is as follows:

> The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. . . . [MCR 3.977(H)(2).]

Accordingly, the rules of evidence do not apply at a termination hearing when "the basis for the court taking jurisdiction of a child is related to the basis for seeking termination of parental rights." *In re Snyder*, 223 Mich App 85, 89; 566 NW2d 18 (1997).

Webb first argues that the trial court erred in admitting lay testimony about her psychological evaluation because her mental health was not a basis for the court taking jurisdiction. Webb is correct—there are no allegations in the original petition regarding her mental health or its impact on her ability to parent her children. When the trial court relies on a new or different circumstance to find a statutory ground for termination, the court must rely on legally admissible evidence. MCR 3.977(F)(1)(b). Dr. Victoria Cox, the author of Webb's psychological report, did not testify. Rather, Saladin, a foster care worker, testified about the contents of the report. This testimony was inadmissible hearsay. See MRE 801 and 802. Nonetheless, any error was harmless because the trial court did not rely on the psychological evaluation in deciding to terminate Webb's parental rights.

Webb next contends that the court abused its discretion by refusing to allow her to testify about the effect she thought termination of her parental rights would have on her children. Webb is not an expert in the field of children's psychology or mental health. She saw her children only once a week at parenting visits for nearly three years. The court did not abuse its discretion in concluding that Webb's opinion on this subject was not relevant to its decision on whether to terminate her parental rights.

Webb also asserts that she was precluded from answering a question about the appropriateness of her housing for parenting visits. However, Webb does not provide a citation to the record for when this occurred. We are unable to find any such example in the record. In fact, Webb provided her opinion on this issue. She testified that, at some point, she had housing that included two beds and a stove, but she did not have a refrigerator. Webb opined that her home was appropriate for short parenting visits. We find no error in this regard.

Finally, Webb argues that the trial court abused its discretion in stopping her attorney from questioning family therapist Evelyn Connelly about whether her health problems made it difficult to meet with Webb. Webb's counsel asked Connelly the following:

> *Q*. Now, you said that you tried to set up to meet with Ms. Webb, was it last year (indistinct)?
>
> *A*. Yes.
>
> *Q*. Okay. Is it possible that some of the reason that it was difficult to meet was that you were having some health problems?
>
> *A*. No, not at that time.
>
> *Q*. All right. You didn't have surgery?

The attorney for the DHS objected to the continued questioning and Webb's attorney said that she was "trying to jog [Connelly's] memory." The court responded, "[S]he hasn't indicated any lack of memory. She's explained what she did on three occasions and I think your suggestion that something else was at work is . . . an insult to the witness and I want you to move on." Presumably, Webb's attorney wanted to explain why Webb never met with Connelly because Connelly testified that respondent did not show up to three meetings.

Further questioning on this topic would have been repetitive because Connelly already answered a question regarding whether she had health problems that made it difficult for her to meet with Webb. In any event, any error was harmless because the court did not mention or rely on these missed meetings when it made its decision to terminate Webb's parental rights.

We vacate the order terminating Grace's parental rights and remand for further proceedings, and affirm the order terminating Webb's parental rights. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Michael J. Riordan
/s/ Michael F. Gadola